



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

Marc Elias, Esq.  
Perkins Coie  
700 13th Street NW  
Suite 600  
Washington, DC 20005

DEC -2 2015

RE: MUR 6821  
Shaheen for Senate and Michelle Chicoine  
in her official capacity as treasurer  
Jeanne Shaheen

Dear Mr. Elias:

On May 21, 2014, the Federal Election Commission notified your clients, Friends of Jeanne Shaheen and Michelle Chicoine in her official capacity as treasurer and Jeanne Shaheen, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended ("the Act"). On November 19, 2015, the Commission found, on the basis of the information in the complaint, that there is no reason to believe that Shaheen for Senate and Michelle Chicoine in her official capacity as treasurer and Jeanne Shaheen violated 52 U.S.C. §§ 30116(f) and 30104(b). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003); Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Allison T. Steinle, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

*Kathleen Guith / by ATB*

Kathleen Guith  
Acting Associate General Counsel

Enclosure  
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Shaheen for Senate and Michelle Chicoine in her official capacity as treasurer  
Jeanne Shaheen

MUR: 6821

**I. INTRODUCTION**

This matter was generated by a complaint, alleging that Jeanne Shaheen, a 2014 candidate for Senate in New Hampshire, and Shaheen for Senate ("Shaheen Committee"), her principal campaign committee, coordinated a television advertisement with the Senate Majority PAC ("SMP"), an independent expenditure-only political committee, resulting in an impermissible and unreported contribution in violation of 52 U.S.C. §§ 30116 and 30104(b) (formerly 2 U.S.C. §§ 441a and 434(b)). The Complaint alleges the Shaheen Committee and the Democratic Senatorial Campaign Committee ("DSCC") communicated via their website and social media, respectively, "material information and requests and suggestions for the SuperPAC" to create an ad that would benefit the Shaheen Committee.<sup>1</sup> The Respondents maintain that the SMP advertisement did not republish Shaheen Committee campaign materials and was not otherwise coordinated, and there is no available information to suggest otherwise. The Commission finds no reason to believe that Shaheen for Senate and Michelle Chicoine in her official capacity as treasurer and Jeanne Shaheen violated 52 U.S.C. §§ 30116(f) and 30104(b) (formerly 2 U.S.C. §§ 441a(f) and 434(b)).

**II. FACTS**

On April 23, 2014, the Shaheen Committee posted a message on its campaign website that read:

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<sup>1</sup> Compl. at 3.

1 More attack ads. Paid for by the Koch Brothers and their special interest money.

2  
3 More proof big oil, the Koch Brothers and Wall Street think they can buy our  
4 Senate seat for Scott Brown.

5  
6 When Brown was the Senator from Massachusetts he gave big oil and Wall Street  
7 billions in special breaks. They gave him millions in campaign contributions.

8  
9 Jeanne Shaheen voted to stop those special breaks. She's leading the fight for a  
10 bipartisan bill to lower energy costs for consumers and create jobs.

11 Jeanne Shaheen. Making a difference for New Hampshire.<sup>2</sup>

12 The Shaheen Committee website included images of photographs of Shaheen and a seven-page  
13 document containing background information related to the allegations in the message.<sup>3</sup> The  
14 following day, the DSCC posted a message on Twitter, including a link, that echoed the same  
15 themes as the Shaheen Committee website.<sup>4</sup>

16 SMP subsequently distributed a television advertisement entitled "Baggage" beginning  
17 on April 25, 2014. The Complaint alleges that the script used by SMP was the same text as the  
18 Shaheen Committee published on its own website.<sup>5</sup> The script of that advertisement provided:<sup>6</sup>

AUDIO	ON-SCREEN MESSAGE
"Scott Brown's carrying some big oil baggage.  In Massachusetts, he voted to give oil companies big breaks—they make record profits, he collects over four hundred thousand in campaign contributions."	Scott Brown:  Voted for Big Oil Tax Breaks <i>New York Times</i> , 5/17/11 Vote #72, 5/17/11  Scott Brown:

<sup>2</sup> *Id.* at 1-2.

<sup>3</sup> *Id.*

<sup>4</sup> "Koch brothers are trying to buy Scott Brown a Senate Seat. Read why here." See <https://twitter.com/dscc/status/459433019669884929> (Apr. 24, 2014 4:45 PM EST).

<sup>5</sup> Compl. at 2.

<sup>6</sup> SMP Resp. at 1-2.

	More than \$400,000 in Campaign Contributions from Oil & Gas Center for American Progress, 2/7/12 Center for Responsive Politics, 4/8/14
"Now Brown is shopping for a new Senate seat. Where?  In oil-rich Texas?  The oil fields of North Dakota?"	Texas  North Dakota
"Nope, Brown wants to bring his big oil baggage to New Hampshire."	New Hampshire Scott Brown's Big Oil Baggage
"Scott Brown: Out for himself and big oil at our expense."	Scott Brown: Out for himself at our expense
"Senate Majority PAC is responsible for the content of this advertising."	Paid for by Senate Majority PAC, www.senatemajority.com. Not authorized by any candidate or candidate's committee. Senate Majority PAC is responsible for the content of this advertising.

1           The Complaint alleges that the "Baggage" advertisement satisfies the Commission's  
2 three-part regulatory test for coordination. First, the Complaint asserts that, because SMP paid  
3 for the advertisement, it satisfied the payment prong.<sup>7</sup> Second, the Complaint contends that the  
4 advertisement satisfied the content prong because it republished campaign materials and  
5 expressly advocated against Scott Brown.<sup>8</sup> Third, the Complaint generally asserts that the  
6 Respondents satisfied the request or suggestion, material involvement, or substantial discussion  
7 standards under the conduct prong, alleging that the Shaheen Committee and the DSCC  
8 "communicated by their websites and social media material information and requests and  
9 suggestions for the SuperPAC . . . to create an illegal coordinate [sic] communication, including

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<sup>7</sup> Compl. at 2.

<sup>8</sup> *Id.*

1 republication of campaign materials.”<sup>9</sup> The Complaint therefore contends that the Respondents’  
2 coordination of the advertisement resulted in an impermissible contribution in violation of  
3 52 U.S.C. §§ 30116 and 30104(b) (formerly 2 U.S.C. §§ 441a and 434(b)).

4 All of the Respondents deny that the communication was coordinated. The joint response  
5 of the Shaheen Committee and Jeanne Shaheen (“Shaheen Response”) disputes that the script for  
6 “Baggage” was posted on the Shaheen Committee website.<sup>10</sup> It states that the message on the  
7 Shaheen Committee website was not a request or suggestion that any group make a  
8 communication on the Committee’s behalf and was only a means to disseminate information  
9 about Scott Brown.<sup>11</sup> The Response asserts that aside from some thematic similarities between  
10 the Shaheen Committee’s website and the SMP advertisement, the Complaint presents no  
11 evidence of coordination between Shaheen, the Shaheen Committee, and SMP.<sup>12</sup> Shaheen and  
12 her Committee assert that they did not request or suggest that SMP create the advertisement, did  
13 not have any involvement in the creation, production, or dissemination of the advertisement, and  
14 did not discuss with SMP the campaign’s plans, projects, activities or needs.<sup>13</sup>

15 The Shaheen Response also argues that the content and conduct prongs of the  
16 coordination analysis are not satisfied. The Response disputes that the advertisement contained  
17 express advocacy or its functional equivalent.<sup>14</sup> It also contends that the advertisement did not

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<sup>9</sup> *Id.*

<sup>10</sup> Shaheen Resp. at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 5.

1 republish campaign materials because it did not copy any of the original Shaheen campaign  
2 materials and only contained thematic similarities based on well-known criticisms of Scott  
3 Brown.<sup>15</sup> Finally, the Response argues that the conduct prong is not satisfied because the  
4 Commission has stated that the conduct prong cannot be satisfied by a general request on a  
5 publicly available website.<sup>16</sup>

6 The DSCC Response is substantially similar to the Shaheen Response. The DSCC  
7 asserts that it did not request or suggest that SMP create the advertisement, did not have any  
8 involvement in the creation, production, or dissemination of the advertisement, and did not  
9 discuss with SMP the campaign's plans, projects, activities, or needs.<sup>17</sup>

10 The SMP Response also argues that the coordination standards are not satisfied. It  
11 asserts that the Complaint presents no evidence of a request or suggestion specifically directed at  
12 SMP.<sup>18</sup> The Response further asserts that the material involvement or substantial discussion  
13 conduct standards cannot be satisfied if information is obtained from a publicly available  
14 source.<sup>19</sup> SMP asserts that the Complaint is premised on a mistake of fact because the  
15 advertisement's script was finalized on April 11, 2014 and production was complete on April 21,

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<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.*; see Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (explanation and justification) ("The 'request or suggestion' conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally."); Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (Jun. 8, 2006) (explanation and justification) ("Under the new safe harbor, a communication created with information found, for instance, on a candidate or political party's website, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication.").

<sup>17</sup> DSCC Resp. at 3.

<sup>18</sup> SMP Resp. at 4.

<sup>19</sup> *Id.*

1 2014, days before the DSCC “tweeted” the message alleged to have informed the content of the  
2 message.<sup>20</sup> The Response argues that, given this timing, there is no way the Shaheen  
3 Committee’s website message could have informed the content of “Baggage.”<sup>21</sup> Finally, SMP  
4 asserts that it utilizes a firewall and thus only specific information showing the flow of material  
5 information is sufficient to overcome a presumption that the conduct standards have not been  
6 satisfied.<sup>22</sup>

### 7 III. ANALYSIS

8 Under the Federal Election Campaign Act of 1971, as amended (the “Act”), an  
9 expenditure made by any person “in cooperation, consultation, or concert, with, or at the request  
10 or suggestion of, a candidate, his authorized political committees or their agents” constitutes an  
11 in-kind contribution.<sup>23</sup> Under Commission regulations, a communication is coordinated with a  
12 candidate, an authorized committee, a political party committee, or agent thereof if it meets a  
13 three-part test: (1) payment for the communication by a third party; (2) satisfaction of one of  
14 four “content” standards of 11 C.F.R. § 109.21(c); and (3) satisfaction of one of six “conduct”  
15 standards of 11 C.F.R. § 109.21(d).<sup>24</sup> Furthermore, the Act provides that a communication that  
16 republishes campaign materials prepared by a candidate’s authorized committee is an  
17 expenditure.<sup>25</sup> Commission regulations deem an expenditure to republish candidate campaign

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<sup>20</sup> *Id.* at 2, 5.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 5.

<sup>23</sup> 52 U.S.C. § 30116(a)(7)(B)(i) (formerly 2 U.S.C. § 441a(a)(7)(B)(i)).

<sup>24</sup> *See* 11 C.F.R. § 109.21.

<sup>25</sup> 52 U.S.C. § 30116(a)(7)(B)(iii) (formerly 2 U.S.C. § 441a(a)(7)(B)(iii)).

1 materials to be an in-kind contribution for purposes of contribution limitations and reporting  
2 responsibilities of the person making the expenditure, regardless of whether the communication  
3 was in fact coordinated with the authorized committee.<sup>26</sup>

4 It does not appear that the alleged activities of the Respondents in connection with the  
5 advertisement here satisfied any of the conduct standards. First, the advertisement does not  
6 appear to contain republished campaign materials.<sup>27</sup> Although the Shaheen Committee website  
7 message and the SMP advertisement share similar themes concerning Brown's tax breaks for  
8 "big oil" and his alleged receipt of large campaign contributions in return, that is the only  
9 overlap between the two communications. This alone is not enough to suggest coordination.  
10 Respondents note that these topics were well-known criticisms of Brown during his 2012 Senate  
11 campaign in Massachusetts and point to other advertisements with similar themes from that  
12 election.<sup>28</sup> The Shaheen Committee campaign materials also cover several different topics that  
13 are not addressed in the SMP advertisement, including Brown's relationship with the financial  
14 industry, with Charles G. and David H. Koch, and Jeanne Shaheen's position on these issues.  
15 Accordingly, it does not appear that "Baggage" satisfied the republication standard.

16 The Complaint also alleges generally that the Respondents' conduct satisfied the request  
17 or suggestion, material involvement, and substantial discussion conduct prongs.<sup>29</sup> All of the  
18 Respondents deny that the advertisement was coordinated and specifically assert that there was  
19 no request or suggestion, material involvement, or substantial discussion. The Complaint itself

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<sup>26</sup> See 11 C.F.R. § 109.23.

<sup>27</sup> See 11 C.F.R. § 109.21(d)(6).

<sup>28</sup> Shaheen Resp. at 4; DSCC Resp. at 4.

<sup>29</sup> 11 C.F.R. § 109.21(d)(1)-(3).



1 fails to identify any communication between the representatives of the Shaheen Committee, the  
2 DSCC, and SMP. Rather, it relies on the public messages placed on the Shaheen Committee  
3 website and DSCC Twitter page as evidence of coordination. The Commission has expressly  
4 stated, however, that a communication resulting from a general request to the public or the use of  
5 publicly available information, including information contained on a candidate's campaign  
6 website, does not satisfy the conduct standards.<sup>30</sup>

7 Further, the alleged thematic similarities of the two communications at issue and their  
8 rough temporal proximity do not give rise to a reasonable inference that any of the conduct  
9 standards were satisfied under the facts presented here, particularly where no other information  
10 suggests that the Respondents engaged in any of the activities outlined in the relevant conduct  
11 standards.<sup>31</sup>

12 The conduct prong of the coordinated communications test was not satisfied here. The  
13 Commission finds no reason to believe that Shaheen for Senate and Michelle Chicoine in her  
14 official capacity as treasurer and Jeanne Shaheen violated 52 U.S.C. §§ 30116(f) and 30104(b)  
15 (formerly 2 U.S.C. §§ 441a(f) and 434(b)).

<sup>30</sup> See Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (explanation and justification); Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (Jun. 8, 2006) (explanation and justification).

<sup>31</sup> Cf. MUR 6613 (Prosperity for Michigan) (dismissing allegations of coordination based solely on thematic similarities and timing in matter in which respondents denied the advertisement was coordinated); MUR 5963 (Club for Growth PAC) (same).